Amarapathi a/p Periasamy v Muniandy a/l Periasamy

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02–18 OF 2005(M)
SITI NORMA YAAKOB CJ (MALAYA) ARIFIN ZAKARIA AND NIK HASHIM FCJJ
15 JUNE 2006

Family Law — Children — Custody — Application by either parent pursuant to s 88(1) of the Law Reform (Marriage and Divorce) Act 1976 — Whether applicant parent has to wait until matrimonial proceedings commenced before applying for custody

Family Law — Children — Custody — Custody of child sought by aunt — No custody battle between natural parents of child — Whether courts could award custody of child to aunt pursuant to s 88(1) of the Law Reform (Marriage and Divorce) Act 1976

Family Law — Custody — Welfare of child of paramount consideration — Factors to be considered by court in custody application

The dispute in the instant case concerned the custody of a child. The appellant and respondent were respectively sister and brother. The respondent was the father of four children. The child at the centre of the custody battle was his third child. His younger sister — the appellant — was childless. When his third child was 3½ months old, the respondent surrendered the care and custody of his third child to the appellant in the belief and hope that by taking care of the child, the appellant would be able to conceive a child of her own. The appellant for over 11 years took care of the child and treated her as if her own. In 2004, the child went to meet her natural parents and siblings. She did not return. The appellant thus sought the assistance of the courts to restore the custody of the child to her. At first instance, the High Court dismissed her application. On appeal, the Court of Appeal agreed with the High Court. The appellant thus appealed to the Federal Court. Counsel for the appellant submitted inter alia that the word 'relative' appearing in s 88(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') empowered the courts to grant a custody order to the appellant in her capacity as a foster parent. Counsel contended that there were exceptional circumstances to warrant the making of such an order.

Held, dismissing the appeal:

(1) The introductory words 'The court may at any time by order' in s 88(1) indicates that there must be a pending custody battle between the parents of a child and that the court is asked to determine which parent has the better right to custody at the expense of the other. The subject matter of the dispute

A is the child of the marriage which under s 2 of the 1976 Act is defined to include a child legally adopted by either of the warring parties before the court. It is when the court finds that the responsibility of custody cannot be given to either parent due to the exceptional circumstances prevailing in any given case that the court turns to a relative to whom custody can be entrusted (see paras 15–16).

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(2) The factual matrix of the instant appeal did not fall within the framework of the s 88(1) of the 1976 Act. The custody battle was not between the natural parents of the child but between her aunt and her father. The appellant could not claim to fit into the shoes of a parent as the 1976 Act made no provision as to the custodial right of a foster parent which the appellant claimed to be (see para 17).

C

(3) A custody application may be made by either parent at any time under s 88(1). The applicant parent need not wait for matrimonial proceedings to commence before the application is made. To that extent, the finding of the High Court that a custody order under s 88(1) could only be obtained where the parents had commenced matrimonial proceedings against each other was erroneous (see para 18).

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(4) In issuing an order affecting the welfare and the future of a minor, a court is mindful of the well entrenched principle of law that the principal consideration is the welfare of the minor. In the instant case, the court also considered the following factors: (a) the child, having been interviewed by the court, expressed a preference to be with her natural parents and siblings; (b) the child has been living with her parents and siblings, aged 18, 15 and 11 for the past 1½ years; (c) the child attended the local government school and at the end of the year would be sitting for her Standard 6 Government Examination; (d) although the respondent was a bread seller, there was nothing to suggest that he was unable to support his non-working wife and his four school going children; (e) the respondent is the natural father of the child; (f) when the respondent parted with her in 1994 and allowed the appellant to nurture and care for the child, it was with the fervent, albeit misguided belief, that the appellant would be blessed with an issue of her own; (g) the surrender of the child to the appellant lacked the element of permanency; and (h) no attempt was made by the appellant to formally and legally adopt the child. On the whole, it was only right and proper that the child be returned to her natural parents where she would be able to lead a more fulfilling life surrounded by the love and affection of her own parents and the companionship of her own siblings (see paras 23–26).

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[Bahasa Malaysia summary

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Pertikaian dalam kes semasa adalah berkaitan hak penjagaan seorang kanak-kanak. Perayu dan responden masing-masing adalah adik perempuan dan abang. Responden merupakan bapa kepada empat orang anak. Kanak-kanak yang merupakan perhatian dalam pertikaian hak penjagaan tersebut adalah anak ketiganya. Adik perempuannya — perayu — tidak mempunyai anak. Apabila anak ketiganya berumur 3½ bulan, responden telah menyerahkan anak ketiganya itu untuk dijaga oleh perayu dengan

kepercayaan dan harapan bahawa dengan menjaga anak tersebut, perayu dapat mengandungkan anaknya sendiri. Perayu selama 11 tahun telah menjaga anak tersebut dan menganggapnya seperti anaknya sendiri. Pada 2004, anak tersebut telah bertemu dengan ibu bapa dan adik-beradik kandungnya. Beliau tidak pulang. Perayu oleh itu memohon bantuan mahkamah untuk mengembalikan hak penjagaan anak tersebut kepadanya. Pada mulanya, Mahkamah Tinggi telah menolak permohonannya. Setelah merayu, Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi. Perayu oleh itu telah merayu ke Mahkamah Persekutuan. Peguam bagi pihak perayu berhujah antara lain bahawa perkataan 'relative' yang terdapat dalam s 88(1) Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta 1976') memberi kuasa kepada mahkamah untuk memberikan satu perintah hak penjagaan kepada perayu dalam kapasitinya sebagai seorang ibu angkat. Peguam menegaskan bahawa terdapat keadaan yang luar biasa untuk mewajarkan perintah sedemikian.

Diputuskan, menolak rayuan tersebut:

(1) Perkataan-perkataan pengenalan 'The court may at any time by order' dalam s 88(1) menunjukkan bahawa terdapat pertikaian hak penjagaan yang belum selesai antara ibu bapa kanak-kanak dan di mana mahkamah telah diminta untuk menentukan ibu bapa mana yang mempunyai hak penjagaan yang lebih baik daripada yang satu lagi. Perkara pokok pertikaian ini adalah berhubung kanak-kanak hasil perkahwinan yang mana di bawah s 2 Akta 1976 mentafsirkan ia termasuklah kanak-kanak yang diambil sebagai anak angkat secara sah oleh salah satu daripada pihak dalam pertikaian tersebut di hadapan mahkamah. Jika mahkamah memutuskan bahawa tanggungjawab hak penjagaan tidak boleh diberikan kepada mana-mana ibu bapa disebabkan keadaan yang luar biasa yang wujud dalam mana-mana kes maka mahkamah berpaling kepada saudara yang mana hak penjagaan dapat diamanahkan (lihat perenggan 15–16).

(2) Matriks fakta dalam rayuan semasa tidak terangkum dalam s 88(1) Akta 1976. Pertikaian hak penjagaan bukanlah antara ibu bapa kandung kanak-kanak tetapi antara ibu saudara dan bapanya. Perayu tidak boleh mendakwa dirinya sebagai ibu kerana Akta 1976 tiada peruntukan berhubung hak penjagaan ibu angkat sepertimana yang dituntut oleh perayu (lihat perenggan 17).

(3) Satu permohonan hak penjagaan boleh dibuat sama ada oleh ibu atau bapa pada bila-bila masa di bawah s 88(1). Pemohon ibu atau bapa tidak perlu menunggu prosiding perkahwinan untuk memulakan sebelum permohonan dibuat. Oleh itu, penemuan Mahkamah Tinggi bahawa satu perintah hak penjagaan di bawah s 88(1) hanya boleh diperoleh apabila ibu bapa tersebut telah memulakan prosiding perkahwinan terhadap satu sama lain adalah salah (lihat perenggan 18).

(4) Dalam mengeluarkan perintah yang akan menjejaskan kebajikan dan masa depan seorang anak bawah umur, mahkamah perlu prihatin tentang prinsip undang-undang yang sudah tetap bahawa pertimbangan utama adalah tentang kebajikan kanak-kanak itu. Dalam kes semasa, mahkamah juga mengambilkira faktor-faktor berikut: (a) kanak-kanak itu, setelah ditemubual oleh mahkamah,

telah menyatakan beliau lebih suka tinggal dengan ibu bapa dan adik-beradik kandungnya; (b) kanak-kanak itu telah tinggal dengan ibu bapa dan adik-beradiknya, yang berumur 18, 15 dan 11 tahun sejak 1½ tahun; (c) kanak-kanak tersebut pergi ke sekolah kerajaan dan pada akhir tahun akan menduduki Ujian Penilaian Sekolah Rendah; (d) meskipun responden merupakan penjual roti, tiada apa yang mencadangkan bahawa beliau tidak mampu untuk menyara isterinya yang tidak bekerja dan empat orang anak yang bersekolah; (e) responden adalah bapa kandung kanak-kanak tersebut; (f) apabila responden berpisah dengannya pada tahun 1994 dan membenarkan perayu memelihara dan menjaga kanak-kanak tersebut, ia adalah berdasarkan kepercayaan yang teguh tetapi salah, yang perayu akan dikurniakan anaknya sendiri; (g) penyerahan kanak-kanak tersebut kepada perayu tidak menunjukkan elemen ketetapan; (h) tiada percubaan telah dibuat oleh perayu untuk secara formal dan sah mengambil kanak-kanak tersebut sebagai anak angkat. Pada keseluruhannya, ia hanya betul jika kanak-kanak tersebut dikembalikan ke pangkuan ibu bapa kandungnya di mana beliau dapat menjalani kehidupan yang lebih bermakna dikelilingi kasih sayang ibu bapanya sendiri dan adik-beradiknya sebagai teman (lihat perenggan 23–26).]

Notes

For a case on the welfare of child of paramount consideration, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) para 2884.

For cases on custodianship, see 7(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2727–2837.

Case referred to

R Saraswathy v R Palakrishnan [1986] 2 MLJ 127 (refd)

Legislation referred to

Guardianship of Infants Act 1961 ss 2, 3, 5, 11
Law Reform (Marriage and Divorce) Act 1976 s 88(1)

Appeal from: Civil Appeal No M–02–211 of 2005 (Court of Appeal, Putrajaya)

Ng Aik Beng (AB Ng & Associates) for the appellant.
Respondent in person.

Siti Norma Yaakob CJ (Malaya) (delivering judgment of the court):

[1] In this appeal, five questions of law have been posed to us for our determination. In substance those questions as expressed in Bahasa Malaysia read as follows:

(1) sama ada s 88(1) Akta Memperbaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 terpakai kepada ibu bapa peliharaan (foster parent) seperti perayu yang memelihara kanak-kanan selama 11 tahun untuk memohon perintah kustodi;

(2) sama ada s 88(1) Akta Memperbaharui Undang-Undang (Perkahwinan dan Perseraian) 1976 hanya terpakai apabila wujudnya prosiding penceraian seperti diputuskan oleh Hakim Mahkamah Tinggi Melaka walaupun bercanggah dengan keputusan Mahkamah Agung dalam kes *R Saraswathy v R Palakrishnan* [1986) 2 MLJ 127;

(3) sama ada ss 2, 3 dan 11 Akta Penjagaan Kanak-Kanak 1961 tidak mempunyai undang-undang prosedur dan substantive tentang isu kustodi melainkan permohonan deklarasi untuk hak guardianship dipohon oleh perayu dalam saman pemula sepertimana diputuskan oleh Hakim-hakim Mahkamah Rayuan;

(4) sama ada ss 2, 3 dan 11 Akta Penjagaan Kanak-Kanak 1961 tidak terpakai kepada ibu bapa peliharaan (foster parent) seperti perayu yang memelihara kanak-kanak selama 11 tahun untuk memohon perintah kustodi sepertimana diputuskan oleh Hakim Mahkamah Tinggi Melaka;

(5) sama ada undang-undang kes *Masam v Salina Saropa & Anor* [1974] 2 MLJ 59 dan *Arumugam s/o Seenivasagam v Sinnamah (f)* [1959] MLJ 130 masih menjadi undang-undang yang baik tentang hak ibu bapa peliharaan (foster parents) untuk memohon hak penjagaan di Malaysia.

[2] The dispute in this appeal is very much a family dispute and is centered on the right to the custody of a 12 year old minor, Lishalina ('the child') who is the daughter of the respondent.

[3] The appellant is a younger sister of the respondent and as such the child is her niece.

[4] Although the appellant has been married for over 15 years, she has never been blessed with a child of her own. Her married brother, the respondent is luckier than her in that he had fathered four children, of whom the child is one. She was born on 21 January 1994 and ranks as the third child amongst her siblings of two brothers and a sister.

[5] It is not disputed that when the child was only 3½ months old, the respondent had surrendered the care and custody of the child to the appellant in the belief and hope that by taking care of the child, the appellant would be able to conceive a child of her own.

[6] That was not to be, and in any event, for well over eleven years, the appellant showered her love and affection on the child, fed and clothed her, provided for her health care and good education and treated her as if she was her own child.

[7] Trouble however emerged when the appellant and her husband took the child to Jitra, Kedah, to meet with the child's natural parents and siblings during the Deepavali celebration of 2004. At the end of the visit, the child was persuaded to stay back with her family with a promise that she would be returned to the appellant. She never did so and to enforce her parental rights, the appellant turned to the courts seeking a number of reliefs the practical effect of which is to restore the custody of the child to her.

[8] In dismissing the appellant's application for custody, the High Court made the following findings.

(1) In her capacity as a guardian, the Appellant cannot claim under ss 2, 3, 5 and 11 of the Guardianship of Infants Act 1961 ('the 1961 Act') to have a superior right of custody of the child to the exclusion of the respondent, the child's natural father.

(2) A custody order under s 88(1) of the Law Reform (Marriage and Divorce) Act 1976 ('the 1976 Act') can only be obtained against a 'child of the marriage' where the parents have commenced matrimonial proceedings against each other which, inter alia, seeks an order for custody. As such the disputants before the court must be the natural parents of the child. As the appellant is not the natural parent of the child, she cannot take advantage of s 88(1).

[9] The Court of Appeal agreed with the findings of the High Court and in dismissing the Appellant's appeal had this to say on s 88(1) of the 1976 Act.

> We do not see the relevance of any of the provisions in the 1976 Act vis-à-vis the instant proceedings. The 1976 Act, according to its preamble, is 'An Act to provide for monogamous marriages and the solemnization and registration of such marriages; to amend and consolidate the law relating to divorce; and to provide matters incidental thereto.' What is obvious to us is that the word 'child' appearing in ss 88 and 90 refers to a child of the marriage. The provisions of the 1976 Act surely cannot at all be applicable to the instant proceedings. The dispute here does not relate to a matrimonial dispute between parties to a marriage.

[10] As for the appellant's reliance on the relevant provisions of the 1961 Act, the Court of Appeal expressed its view in the following manner.

> We are of the view that the appellant does not at all fall within the contemplation of the word 'guardian' under the provisions of the Act. We are also of the view that the appellant's application does not at all fall within any of the provisions of the Act. L have parents who are still living and they seem to be happily married. The appellant has never been appointed as guardian of L by her parents pursuant to the provisions of any written law.

[11] 'L' referred to by the Court of Appeal is the child.

[12] The judgment ended with the following words.

> In the instant proceedings, the respondent had never abandoned L to the care of the respondent. She is now living with her immediate family and will grow up with her brothers and sister and with her natural parents. There is nothing to show that L's parents are unsuitable to take care of L. The court is primarily concerned with the welfare of L and not with the welfare of the parties to the dispute.

[13] Before us, Mr Ng Aik Beng, learned counsel for the appellant chose to submit on the provisions of s 88(1) of the 1976 Act to support his contention that the word 'relative' appearing in that sub-section empowers us to grant a custody order to the

appellant in her capacity of a foster parent. He contended that there are exceptional circumstances to warrant the making of such an order. A

[14] Section 88(1) contains the following provisions.

> 88 (1) The court may at any time by order place a child in the custody of his or her father or his or her mother or, where there are exceptional circumstances making it undesirable that the child be entrusted to either parent, of any other relative of the child or of any association the objects of which include child welfare or to any other suitable person. B

[15] The introductory words 'The court may at any time by order' in the subsection is a giveaway in that there must be a pending custody battle between the parents of a child and that the court is asked to determine which parent has the better right to custody at the expense of the other. The subject matter of the dispute is the child of the marriage which under s 2 of the 1976 Act is defined to include a child legally adopted by either of the warring parties before the court. C

[16] It is when the court finds that the responsibility of custody cannot be given to either parent due to the exceptional circumstances prevailing in any given case that the court turns to a relative to whom custody can be entrusted. D

[17] The factual matrix of the instant appeal does not fall within the framework of the subsection. The custody battle is not between the natural parents of the child but between her aunt and her father. The appellant cannot claim to fit into the shoes of a parent as the 1976 Act makes no provision as to the custodial right of a foster parent which the appellant claims to be. For that very reason, we had answered question (1) posed to us in the negative. E F

[18] As for the timing of the custody application, it can be applied for by either parent at any time under s 88(1) and this is confirmed by the case of *R Saraswathy v R Palakrishnan* [1986] 2 MLJ 127. The applicant parent need not wait for matrimonial proceedings to commence before the application is made. To that extent the finding of the High Court judge that a custody order under s 88(1) can only be obtained where the parents have commenced matrimonial proceedings against each other is erroneous. That is the reply we give to question (2). G

[19] The Court of Appeal had also dealt at length with the issue as to whether the appellant was a guardian within the meaning of the 1961 Act, to entitle her to claim interim custody of the child. In so doing, it made reference to ss 2, 3 and 11 and concluded that from the affidavit evidence the respondent had not appointed the appellant a guardian of the child to entitle the appellant to come within the relevant provisions of the 1961 Act. As we consider that the Court of Appeal had not made any finding in the manner expressed by question (3), we had declined to answer the question posed. H I

[20] Question (4) seeks our confirmation whether the High Court was correct when it found that the Appellant cannot seek the protection of ss 2, 3 and 11 of the 1961 Act to maintain her claim for custody as a foster parent. This is so as the

A provisions of the relevant sections are concerned with the rights and authority that are vested in a child's father and mother and not to a third party like the appellant. We see nothing wrong with the judge's finding on this issue and therefore merits no answer from us.

B **[21]** We had also declined to answer question (5) as the two cases cited speak for themselves based on the facts peculiar to each case.

[22] We now came to the crux of this appeal. As we had asked the child to be present during the hearing before us, we took the liberty of interviewing her in the C privacy of our chambers and in the absence of the appellant and the respondent. We felt that at the age of 12, she would be in a position to voice her preference and since she had not been interviewed by either the High Court or the Court of Appeal, we felt that her input would make that difference as to the decision that we should arrive at in these proceedings.

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[23] She came across as a confident young girl, spoke well and appeared to be quite unfazed by the attention drawn to her following the conflict between her aunt and her father. As the purpose of the interview was to ascertain which party she preferred to spend her future life with, she candidly chose to be with her parents and siblings.

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[24] In issuing an order effecting the welfare and the future of a minor, a court is mindful of the well entrenched principle of law that the principal consideration is the welfare of the minor.

F **[25]** The child has been living with her parents and siblings, aged 18, 15 and 11 for the past 1½ years in Jitra, Kedah. She attends the local government school and at the end of this year she will be sitting for her Standard 6 Government Examination. Although the respondent is a bread seller, there is nothing to suggest that he is unable to support his non-working wife and his four school going children.

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[26] It must not be forgotten that the respondent is the natural father of the child and when he parted with her in 1994 and allowed the appellant to nurture and care for the child, it was with the fervent belief, however misguided, that the appellant would be blessed with an issue of her own. As such the surrender of the child to the H appellant lacked the element of permanency. This is also borne out by the fact that no attempt was made by the appellant to formally and legally adopt the child. As more than 11 years have passed and she has yet to conceive a child of her own, it is only right and proper that the child be returned to her natural parents where she will be able to lead a more fulfilled life surrounded by the love and affection of her own parents and the companionship of her own siblings.

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[27] Based on those considerations and that the appellant had no right in law to force the respondent to return the child to her, we had dismissed her appeal with costs and ordered that the deposit be paid out to the respondent in full and final settlement of his costs.

[28] Both my learned brothers, Arifin Zakaria and Nik Hashim FCJJ, who had sight of this judgment in draft concur with the reasons given for dismissing this appeal with costs and the consequential order made therein.

Appeal dismissed.

Reported by John Paul Simon